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Illegality and the civil law in Singapore: Lessons from the UK? Patel v Mirza [2016] 3 WLR 399; [2016] UKSC 42

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Illegality and the Civil Law in Singapore: Lessons from the UK? *Patel v Mirza* [2016] 3 WLR 399; [2016] UKSC 42

The law on the illegality defence in Singapore is in a fragmented state. In *Patel v Mirza*, the UK Supreme Court attempted to overhaul this notoriously confusing area of the law, and presented various ideas which are of potential interest to its development in Singapore.

Introduction

Suppose A lends a skilled investor (B) some money to seize on an investment opportunity. B is to make the investment. The two will then split the profits. If the investment opportunity eventually fails to materialise, A may obtain restitution of the money from B, on the ground of failure of consideration.

Now suppose the investment opportunity were one involving insider trading. Can A still get his money back from B if the opportunity does not materialise? Or can B successfully raise the defence that A cannot ask the Court to "lend its aid to a man who founds his cause of action upon an immoral or an illegal act"?[1] This was the dilemma facing the nine-judge UK Supreme Court in *Patel v Mirza* ("*Patel*").[2]

In Singapore, at common law, A's claim would probably fail. In *Cheng Mun Siah v Tan Nam Sui*, where a buyer of property claimed that the contract of sale was void for illegality under the Residential Property Act, the Court did not allow the buyer to recover the deposit he had paid because (a) the Court would not "assist either one or the other of the parties"; (b) the plaintiff "cannot be heard to allege his own turpitude and … any loss he may suffer is well-deserved".[3]

In *Patel*, on the other hand, all nine Judges allowed A's claim. Of particular interest is how they treated the landmark case of *Tinsley v Milligan* ("*Tinsley*"),[4] which laid down the "reliance principle" – which is very similar to the Court's ruling in *Cheng Mun Siah* that the plaintiff "cannot be heard to allege his own turpitude". The majority (led by Lord Toulson) overruled *Tinsley* and held in favour of the plaintiff. Notably, the minority (led by Lord Sumption) chose not to overrule *Tinsley*, but still reached the same result.

Patel also addresses the broader methodological question of how the illegality **principle** can be said to translate into legal **rules** which are in harmony while being sensitive to the different contexts (e.g. different legal causes of action) in which they apply.

This note aims to reflect on *Patel* with a particular focus on ideas in it that may be of interest for the future development of the law in Singapore. It has proven difficult to organise a note on such a multi-faceted topic; what follows is simply a series of comments on a selection of various important issues raised in *Patel*.

The Policy Rationale for the Illegality Defence

The Singapore Courts have rarely attempted to articulate robustly the rationale for the illegality defence. The leading case of *Ting Siew May v Boon Lay Choo* ("*Ting*") held that it is a matter of the "wider public interest",[5] apparently referring to the public interest considerations behind the statute that has been contravened. But often the statute has only stipulated that certain conduct (e.g. insider trading) has certain consequences (e.g. criminal sanctions). It has not stipulated that certain related but different conduct (e.g. a contract to commit insider trading, or a claim that an accomplice to insider trading has acted negligently) has certain other consequences (e.g. inability to recover damages). Why should the common law come in and stipulate what the legislature has deliberately chosen not to stipulate?

A better explanation for the illegality defence was provided in *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* ("*ANC*"): that "[t]he court cannot allow a litigant involved in turpitude to call in aid the court's coercive powers to advance or benefit from his turpitude"; in other words, as held by McLachlin J in the Canadian case of *Hall v Hebert*, the court cannot "punish conduct with the one hand while rewarding it with the other", which would threaten the "integrity of the legal system".[6] In other words, the illegality defence is not about the policy behind the **particular** rule being violated, but rather about a broader policy relating to the legal system as a whole.

The majority in *Patel* turned such statements of public policy directly into rules of law. Lord Toulson held that the purposes of the illegality defence are the policies that "a person should not be allowed to profit from his own wrongdoing" and that "the law should be coherent and not self-defeating, condoning illegality by giving with the

left hand what it takes with the right hand".[7] He therefore held that the test for the illegality defence is one that involves assessing **these very policies** (as weighed up against other policies).[8] The point was: because rules on illegality ultimately exist to serve these policies, the court should simply apply these policies directly.

Such an approach may be a useful argument for Singapore practitioners who seek to urge the Court not to apply the framework in *Ting* as if it were a set of rigid rules. However, it is not perfect. Consider *United Project Consultants Pte Ltd v Leong Kwok Onn*,[9] where a company had been penalised for making inaccurate tax returns. The Court of Appeal allowed its claim against its tax agent for failing to warn it about the inaccuracies. The difficult is that there were two different types of wrongdoing: the plaintiff's violation of tax law, and the defendant's tort of negligence. The Court's finding in favour of either party could thus be criticised for enabling the other's wrong. An approach based on principles of public policy would therefore have been no clearer than one based on legal rules.

There is another related problem: that of taxonomy. In Singapore, the doctrine of illegality has been applied not only as a defence, but also in the assessment of damages for loss of income (where the income was from illegal sources)[10] and in determining whether a duty of care exists or has been breached.[11] In *Patel* itself, while the defendant claimed that illegality was a defence, the plaintiff claimed that illegality was the very reason why the claim ought to succeed. How should the law on illegality, with its multifarious applications, be sub-divided, if at all? Should it be divided into tort, contract, and unjust enrichment? Or into illegality as a reason for allowing an action, a factor limiting the remedy, and a defence? Or should there be simply just one umbrella principle of illegality and public policy?

The Various Approaches in *Patel*

Patel demonstrates at least three different possible approaches. In a recent lecture, Lord Neuberger described Lord Toulson's approach as being "virtually identical" to that in *Ting*.[12] We will now examine it, followed by Lord Neuberger's and Lord Sumption's.

Lord Toulson's Approach

Lord Toulson, leading the majority, seems to have proceeded on the basis that, once some illegality exists **somewhere**, then the court **must** analyse whether the "public interest in preserving the integrity of the justice system should result in denial of the relief claimed". Thus, Lord Toulson eschewed "over-complex rules",[13] such as analysing whether the plaintiff was "'getting something' out of the wrongdoing",[14] whether a contract is "tainted by illegality",[15] or whether title has passed.[16] In place of these, the court simply had to ask whether, in the light of various public policy considerations, "denial of the claim would be a proportionate response to the illegality".[17]

Thus, Lord Toulson laid down the following framework. The Court will not "enforce a claim if to do so would be harmful to the integrity of the legal system". The Court will consider: (a) "the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim"; (b) "any other relevant public policy on which the denial of the claim may have an impact"; and (c) "whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts".[18]

This is a consequentialist approach. It asks not whether the plaintiff has the right to bring a claim (i.e. whether the substantive law governing the transaction is on the plaintiff's side), but rather whether the Court will enforce that claim (i.e. whether the Court will assist the plaintiff to enforce that law). For example, Lord Toulson would ask not whether title had passed under an illegal contract, but rather whether the Court would "lend its assistance to an owner to enforce his title".[19]

Lord Neuberger's Approach

Lord Neuberger's approach was to lay down a "general rule" (which he called "the Rule") that in "a claim for the return of money paid by the claimant to the defendant pursuant to a contract to carry out an illegal activity, [when] the illegal activity is not in the event proceeded with owing to matters beyond the control of either party … the claimant is entitled to the return of the money which he has paid."[20]

Comment on Lord Neuberger's and Lord Toulson's Approaches

One would think that Lord Neuberger's "Rule" avoids the complexity of "balancing of the kind suggested by Lord Toulson".[21] However, the "Rule" is not that clear: it comes with the provisos that it is only a "*prima facie* or presumptive approach",[22] and that it is an entirely separate question whether or not the "Rule" should even apply at all.[23] For example, said Lord Neuberger, the "Rule" should not apply where the defendant has changed his position after receiving the money or where the criminal law in question exists to protect the defendant.[24]

Similarly, Lord Toulson did not go so far as to create completely unfettered judicial discretion. By contrast, he held: "a person who satisfies the ordinary requirements of a claim in unjust enrichment will not prima facie be debarred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was an unlawful consideration". Hence, the plaintiff could recover simply because there was "[n]o particular reason … to justify [the defendant's] retention of the monies" despite the presence of illegality.[25] Like Lord Neuberger, he would have allowed exceptions to this rule, such as "a contract … of a nature too grossly immoral for the court to enter into any discussion of it".[26]

In short: despite their apparent differences, both Lord Toulson and Lord Neuberger applied a policy-based analytical framework that recognised that the law ought to have different starting points depending on the type of claim brought, and to identify specific types of public policy that may tilt the case one way or another. They even took into consideration the same policy factors.[27] While Lord Toulson's reasoning was more explicitly consequentialist than Lord Neuberger's, ultimately Lord Toulson allowed the claim not because there were consequentialist reasons to do so, but rather that there were no reasons, consequentialist or otherwise, not to; and Lord Neuberger, similarly, allowed the claim because the Rule demanded it and there were no reasons not to apply the Rule. The difference between the two may be more apparent than real.

Lord Sumption's Approach

What is radically different is Lord Sumption's approach. It endorsed the "reliance test" (to which we will return later) – "whether the person making the claim is obliged to rely in support of it on an illegal act on his part".[28] Hence, his reasoning was carefully analytic: the illegality rendered the contract void; and if a contract is void for any reason, then restitution must follow.[29] Any exceptions are to be very specifically defined, rather than part of a general public policy. Otherwise, the Courts would not only be exercising too much discretion at the expense of consistency,[30] but also failing to explain the "analytical connection between the illegality and the claim".[31]

Comment on Lord Sumption's Approach

On closer inspection, cracks appear in this approach. First, as we will see below, there is no single principle that explains why the exceptions to the rule are what they are. Lord Sumption explains such exceptions with maxims such as "the parties to the illegal act are not on the same legal footing" or that there is an "overriding statutory policy";[32] but surely these are as potentially open-ended as a more explicitly discretionary approach. Second, it merely postpones the analytical inquiry: Lord Sumption's rule about illegality is really a rule about contractual voidness; it works by assuming that illegality causes contractual voidness; but this skips over the question of **why**, and **when**, illegality does so.

Because Lord Sumption's rule is really one about the consequences of contractual voidness, unlike the majority's approach, it has nothing to say about illegality in (for example) tort law. Lord Sumption claims to achieve consistency in the law,[33] but he achieves consistency in the law of restitution at the potential expense of consistency in the law of illegality.

Whether one type of consistency should be valued more than the other is a very high-level issue that goes to the heart of how the legal system is organised. To the extent that illegality unravels everything, one can justify having a law of illegality that operates independently from the strictures of the law of restitution. As Lord Kerr put it, the Court could simply not "effectively ignor[e] the illegality that surrounded the making of the contract", no matter what the cause of action is.[34] Similarly, Singapore law has chosen to treat illegality as being capable of overriding parties' legal rights.[35]

In short, the same criticisms made against Lord Neuberger's approach may be made against Lord Sumption's, but at least Lord Neuberger was candid about focusing on public policy rather than legal principle. But this leads to another difficult problem: might the public policy of illegality end up swallowing up the rules of unjust enrichment?

Rules on Illegality Versus Other Legal Rules

Suppose the contract in *Patel* had been partly performed. For Lord Sumption, the plaintiff should win because the law of unjust enrichment is such that restitution should be available whether the failure of consideration is total or partial.[36] For Lord Neuberger, the plaintiff should win, not because of this **juristic reason**, but because the **reasons of public policy** for the plaintiff winning would be the same whether the failure of consideration is total or partial.[37]

Thus, instead of engaging with debates such as (a) whether restitution is available on the ground of **partial** failure of consideration; and (b) whether cases of contractual illegality are **always** cases of total failure of consideration because illegal consideration is no consideration at all,[38] Lord Neuberger simply said: "the correct analysis is not the centrally important issue, given that the question as to how the court deals with illegal contracts is ultimately

based on policy".[39] Similarly, later he said that a situation in which the defendant had "received the money and had altered his position so that it might be oppressive to expect him to repay it"[40] should be an exception to the rules on illegality, rather than simply part of the separate change-of-position defence in the law of unjust enrichment.

Singapore law, which has held that the law of illegality can trump parties' rights, must carefully consider in what ways it may and may not do so. It is one thing to hold, as did Lord Toulson, that illegality can trigger the Court's discretion as to whether or not the parties' legal rights should be enforced. It is another for illegality to alter the legal rules that are **constitutive** of those legal rights – the Singapore Courts have never gone this far.

The "*in pari delicto*" Maxim

Singapore law has tended to place heavy reliance on the maxim *in pari delicto potior est conditio defendentis* ("where both parties are equally in the wrong the position of the defendant is the stronger").[41] This maxim has been deployed (albeit *obiter*) to reach an opposite conclusion from that in *Patel*. *Top Ten Entertainment Pte Ltd v Lucky Red Investments Pte Ltd* involved what was in effect a claim for restitution. In that case, a lessee was to pay both "hiring charges" for furniture and "rent" for premises. After a while, it sought a refund of payments it had made to the lessor, alleging that they had been made pursuant to an illegal transaction to evade tax by overstating the "hiring charges" and understating the "rent". The Court of Appeal held that, had there been such illegality (on the facts there was not), the lessee would not be entitled to a refund of the payments it had made because it was "*in pari delicto*" with the lessor, having been "very much privy to" the apportionment between the "hiring charges" and the "rent".[42]

In *Patel*, however, Lord Mance flatly rejected the idea that a "lack of parity of delict between the parties" could be a "bar to rescission",[43] and Lord Toulson said that such maxims tend to "fetter the law" and "distract the court's mind from the actual exigencies of the case".[44] Such criticism prompts a re-examination of the *in pari delicto* maxim in Singapore.

Consider the following cases. In *Ken Glass Design Associate Pte Ltd v Wind-Power Construction Pte Ltd*, a bogus sale and purchase agreement (which was in reality a sale and leaseback) was held void as an illegal attempt to deceive JTC. The Court held that, because the parties were in pari delicto, "they should as far as possible be returned to their original positions";[45] thus, the defendant "purchasers" got their stakeholder moneys back. By contrast, in *Cheng Mun Siah* (discussed above), the purchasers did **not** get their deposit back. And in *Public Prosecutor v Intra Group (Holdings) Co Inc and ANC*, the fact that the parties were in pari delicto was said to be a reason to let their "losses lie where they fall".[46]

How might this disparity be explained? In *Ken Glass*, unlike *Cheng Mun Siah*, the purchasers' deposit was in the hands of a stakeholder, not the vendor. To let the losses lie where they fell would have left the stakeholders with money which they could not touch. In other words, the *in pari delicto* maxim was not the main reason why the case was decided the way it was; the true reason was the court's desire to tie up loose ends. This suggests that the *in pari delicto* maxim is unsatisfactory as it is merely a placeholder for more complex considerations. But with what ought it to be replaced?

In *Patel*, Lord Sumption said that the maxim is really short for two sorts of cases: (a) where the "[plaintiff's] participation in the illegal act is treated as involuntary", e.g. induced by "fraud, undue influence or duress"; (b) where "the application of the illegality principle would be inconsistent with the rule of law which makes the act illegal", e.g. where the rule is "intended to protect persons such as the plaintiff against exploitation by the likes of the defendant".[47]

This in fact echoes ideas already seen in Singapore case law. We have examined *United Project Consultants*, where a company was allowed to recover from its negligent tax agent for failing to warn the company that it fell afoul of tax laws; this was justified on the grounds that the appellant's offence was due to an "honest misapprehension" rather than "conniv[ing] to cheat IRAS by evading tax", and that to disallow the claim "would be to reward the wrongdoer and punish the innocent party".[48] The language of "wrongdoer" and "innocent party" echoes Lord Sumption's exception to his rule in cases where the rule violated is one which exists to protect the plaintiff against the defendant. This shows that there are much clearer tests that can be applied than the *in pari delicto* maxim.

But how can such tests be rationalised as part of the broader illegality defence? Consider *Hounga v Allen*, where the plaintiff illegal worker, who had been trafficked into England, abused, and then fired, sued her employer for dismissing her discriminatorily. The employer could not raise the defence that the contract of employment was void for illegality. For Lord Toulson, this was because the public policy against human trafficking outweighed the public policy in favour of allowing the illegality defence.[49] By contrast, Lord Sumption explained the same case as being one in which the plaintiff did not need to **rely** on her illegal entry into the UK to make her claim.[50] This brings us to our next issue: can such a "reliance" principle rationalise the law on illegality?

The "Reliance Principle"

The "reliance principle" is commonly thought of as a rule of property law established in *Tinsley v Milligan*: "[a] party to an illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title without relying on his own illegality".[51] However, until its scope was limited by the Court of Appeal in *Ting* to claims to vindicate proprietary rights, it was thought in Singapore to have created a "principle of general application".[52]

The Principle in *Tinsley v Milligan*

In *Tinsley*, Tinsley and Milligan both contributed money toward buying a property, which was put in Tinsley's sole name for the illegal purpose of defrauding the authorities by giving the impression that Milligan was eligible for social welfare benefits. Tinsley now claimed that the property was hers absolutely. The House of Lords held that it was not: Milligan successfully claimed to have an equitable interest in the property. To claim this, Milligan did not have to rely on her illegality; she only had to rely on the fact that she contributed money toward the purchase price, after which the presumption of resulting trust would kick in. By contrast, Tinsley could not win because she **would** have to rely on her illegality to rebut the presumption of resulting trust.[53]

The immediately obvious criticism of this decision is that it does not define "reliance". Milligan only had to "rely" on the fact that she contributed money toward the purchase of the house; she did not have to say **why** she wanted to buy the house or **why** it was to be in Tinsley's sole name.[54] By contrast, Tinsley could not win because she would have to prove not only **that** the parties wanted the house to be in her sole name, but also **why** they wanted it to be. Why did Tinsley have to bear a more difficult burden of proof?

The "Reliance Principle" in Singapore

In Singapore, a few cases illustrate further problems with the reliance principle.

In *Suntoso Jacob v Kong Miao Ming*, a case which pre-dates *Tinsley*, the appellant had transferred shares to the respondent pursuant to an illegal purpose. The appellant sought to get them back on the grounds that the respondent held them on either an express trust or a presumed resulting trust for the appellant. The Court rejected the resulting trust argument on the ground that "the unlawful purpose of the transfer cannot be ignored. It is too artificial to sever the purpose from the transactions, i.e. the transfer of the … shares to the respondent without any payment…"[55] In other words, the Court rejected the reasoning which was later used in *Tinsley v Milligan*.

But after *Tinsley*, the Court in *Chee Jok Heng Stephanie v Chang Yue Shoon* ("*Chee*") allowed the plaintiff, who had given money to the defendant to be held on an express trust for her with the intention of preventing it from being seized by the police, to get her money back. This was because she did not have to rely on the trust agreement "for any purpose other than providing the basis of [her] claim to a property right".[56] Regrettably, the Court did not consider the point in *Suntoso Jacob* that the trust agreement was nonetheless motivated by an unlawful purpose. Instead, the Court not only accepted the reasoning in *Tinsley*, but extended it to a case involving an **express** trust.

Furthermore, the basis of the remedy granted in *Chee* was not a declaration that the defendant held the money on trust for the plaintiff, but rather the **common-law** remedy for money had and received (i.e. restitution of unjust enrichment).[57] This would imply that the claim was a personal claim founded on the fact of the defendant's enrichment rather than a proprietary claim founded on the plaintiff's equitable interest, i.e. the principle in *Tinsley v Milligan* may have been extended past the realm of pre-existing property rights. Yet in *Ting*, the Court of Appeal held that the "reliance principle" is limited to cases premised on an "independent cause of action" from the contract, e.g. an assertion of a proprietary interest.[58]

The "Reliance Principle" as Discussed in *Patel*

These Singapore cases illustrate the instability of the reliance principle. It is therefore noteworthy that the majority in *Patel* disapproved of the reliance principle altogether (as opposed to merely cutting down its scope, as in *Ting*). This was for two reasons.

First, as Lord Toulson said, the reliance principle is arbitrary because it turned on a "procedural technicality", viz. the presumption of advancement.[59] Lord Sumption, though he did not disapprove of the reliance principle, disapproved of the technicality with which it was applied: "If Ms Tinsley had been a man and Ms Milligan had been his daughter, the decision would have gone the other way because the presumption of resulting trust would have been replaced by a presumption of advancement … This is because the equitable presumptions operate wholly procedurally, and have nothing to do with the principle which the court is applying in illegality cases."[60]

Second, Lord Kerr added that it is unclear what exactly is relied upon, which makes the application of the principle uncertain.[61] He pointed out that, in *Tinsley*, Milligan did not need to rely on the illegal **part** of her agreement (viz. the falsity), but she **did** rely on the **rest** of her agreement (viz. the intention that the beneficial interest be held jointly).[62] This involved an act of severance, which could be artificial given that it ignores the illegality no matter how large its "looming presence".[63]

However, Lord Sumption said that, although the way the reliance principle had been applied in *Tinsley* was wrong, the reliance principle was in principle sound because it "establishes a direct causal link between the illegality and the claim".[64] Like the majority's approach, this was an attempt to distinguish between illegal acts which were "collateral or matters of background only" and those which were more closely connected to the plaintiff's claim.[65]

It appears that the majority's approach is sounder for the following reasons.

While Lord Sumption claimed that the reliance test brought more certainty, he did not squarely address any of the concerns listed above. He did not say exactly **how** the reliance test was to be "[s]horn of the arbitrary refinements introduced by the equitable presumptions", as he said was necessary.[66]

It is not even clear that, in *Patel*, the plaintiff was not relying on illegality: after all, the unjust factor being failure of basis, the plaintiff did have to say that **once** there was a contract – this would then lead into a debate as to whether the plaintiff needed to rely on the **reason** why the basis of that contract had now failed (viz. the illegality), or merely the **fact** that it had failed. This was the very problem that was glossed over in *Tinsley*.

While Lord Sumption did not put forth a robust defence of the reliance principle, Lord Mance sought to salvage the reliance principle by adding the gloss that it matters **why** a party wishes to rely. He said that reliance in order to **enforce** an illegal contract should not be allowed, but reliance in order to **restore** the *status quo* (i.e. to **undo** an illegal contract) should be allowed.[67] However, this in turn brings us back to the problem of whether, if such a principle is subject to such a caveat which is specific to the law of restitution, it can really be said to be an overarching legal principle.

It is therefore time for Singapore law to get rid of the last vestiges of the reliance principle. In *Ting*, one reason for not applying the reliance principle was that it would encourage parties to "characterise (or, more accurately, 'dress up') the facts in order to make the argument".[68] For the reasons given by Lord Kerr, if this reasoning is correct, then it ought to apply to all cases, not just those involving illegal contracts.

Legal Certainty

Another major issue raised by *Patel* is that of legal certainty. It has long been recognised that the principle of illegality leads to a result that is "contrary to the real justice, as between [the defendant] and the plaintiff".[69] In practical terms, this means that the illegality principle has the potential to frustrate parties' expectations.

Lord Toulson dismissed concerns of such "uncertainty and unpredictability" on the ground that cases involving "people contemplating unlawful activity", unlike "everyday lawful activities", are not "areas in which certainty is particularly important".[70]

To the contrary, Lord Neuberger held that "criminals are entitled to certainty in the law just as much as anyone else", as are "innocent third parties". Moreover, "there is a general public interest in certainty and clarity in all areas of law", especially since unclarity in the law would only place "more demands … on the services of the courts".[71]

Interestingly, this debate was mentioned in *Ting*, but to the opposite effect. The Court of Appeal held that "**some** uncertainty" (emphasis in original) is acceptable because it is better than having a rigid rule that would err on the side **against**, not in favour of, the plaintiff.[72] In other words, *Ting* promotes the following sort of certainty: the starting point is that parties should assume that any contract involving any illegality will be void; and, if it is not, it would be a happy bonus.[73]

But this does not consider to whom the bonus accrues. Suppose the defendant in *Ting* claimed that he was repenting because he had discovered that the contract was illegal, but in reality wanted to back out of the deal for the selfish reason that it turned out to be a bad bargain. An argument based on the public interest would be neither here nor there. The public policy against illegality would weigh in favour of the defendant, but the public policy against allowing parties to go back on their word for reasons only of regret would weigh in favour of the plaintiff.

Ultimately, this problem is insurmountable as it is inherent in the "balancing" approach in *Ting* and in Lord Toulson's judgment. The best way to bring about legal certainty in a principled manner may well be some degree of legislative reform. This, too, was discussed in *Patel*.

The Role of Legislation

New Zealand's Illegal Contracts Act 1970 declares that "every illegal contract shall be of no effect" but grants the Court discretionary power to grant relief, having regard to a list of factors.[74] The Singapore Academy of Law's Law Reform Committee once proposed a similar Act for Singapore.[75] The Court in *Patel* was divided over whether such statutes may be criticised for allowing too much judicial discretion.[76]

However, we can draw another lesson from the Illegal Contracts Act: that the discretion it lays down is "subject to the express provisions of any other enactment".[77] In other words, it is open to the Legislature to specify how **each** criminal offence interacts with the civil law.

An example is hinted at in *Patel*. The provision which criminalised insider trading was s 52 of the Criminal Justice Act 1993. Section 63(2) of that Act provided: "No contract shall be void or unenforceable by reason only of Section 52."[78] On the facts, s 63(2) did not apply because the definition of "contract" did not include the contract in *Patel*. Nonetheless, the general point in the previous paragraph stands.

The Singapore law of illegality ought to embrace this possibility, which already has roots in the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act ("CDSA").[79] The CDSA requires the Court, on the application of the Public Prosecutor after someone is convicted of one of a number of defined "serious offences", to order that benefits derived from that criminal conduct be confiscated.[80] Incidentally, insider trading is also a "serious offence".[81]

Entering into an arrangement to assist another to retain the benefits of criminal conduct (e.g. by transferring them to someone else, using them to acquire property, or using them to secure funds) is also a "serious offence" under the CDSA.[82] Thus, fact patterns as in *Patel* and *Tinsley* would be caught by the CDSA if the underlying illegality is itself a "serious offence".

In *Patel*, the Court recognised the potential impact of similar legislation in the UK,[83] but parties did not make submissions on it.[84] This is therefore an open point which should be borne in mind in Singapore. One might very well ask, given that the Legislature has laid down a regime which would dictate a certain fate for transactions involving certain crimes, what the proper way to interpret the Legislature's silence as to transactions involving other types of crimes is.

Conclusion

The Court in *Ting* described "illegality and public policy" as being "one of the most confused (and confusing) areas in the common law of contract".[85] Lord Toulson similarly said that the law of illegality is fraught with "uncertainty, complexity and sometimes inconsistency".[86] The difficulty is how to rationalise and simplify the law without, as Lord Sumption put it, "simply substitut[ing] a new mess for the old one".[87]

With these provisos in mind, *Patel* has provided many options for future development of the law in Singapore, as well as highlighted a few potential pitfalls. Most significantly, each Judge attempted to explain, explicitly or otherwise, to what extent the theory and rules of illegality ought to cut across all areas of private law, as opposed to being limited to a particular part of it. The law in Singapore after *Ting*, particularly regarding the fate of the "reliance principle", is in a somewhat fragmented state; the most significant point to take away from *Patel* is that it is worth taking a step back from individual cases to first address such broader questions about whether such fragmentation is bad, good, or simply unavoidable.

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Notes

1 *Holman v Johnson* (1775) 98 ER 1120, 1121; 1 Cowp 341, 343.
2 *Patel v Mirza* [2016] 3 WLR 399; [2016] UKSC 42.
3 *Cheng Mun Siah v Tan Nam Sui* [1979–1980] SLR(R) 611 (HC), at [7].
4 *Tinsley v Milligan* [1994] 1 AC 340 (UKHL).
5 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 (CA), at [24].
6 *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666 (HC), at [80] and [84].
7 *Patel*, at [99].
8 *Patel*, at [109].
9 *United Project Consultants Pte Ltd v Leong Kwok Onn* [2005] 4 SLR(R) 214 (CA).
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13 *ParkingEye Ltd v Somerfield Stores Ltd* [2013] QB 840 (EWCA), at [52] (Toulson LJ).
14 *Patel*, at [100].
15 *Patel*, at [109].
16 *Patel*, at [110].
17 *Patel*, at [120].
18 *Patel*, at [120].
19 *Patel*, at [110].
20 *Patel*, at [145]–[146].
21 Lord Clarke thought so: *Patel*, at [212].
22 *Patel*, at [162].
23 *Patel*, at [170]–[173].
24 *Patel*, at [162] read with [172].
25 *Patel*, at [116].
26 *Patel*, at [116].
27 *Patel*, at [174].
28 *Patel*, at [234].
29 *Patel*, at [250].
30 *Patel*, at [262(ii)].
31 *Patel*, at [262(iv)].
32 *Patel*, at [264].
33 *Patel*, at [232].
34 *Patel*, at [140].
35 *Ting*, at [23]–[24].
36 *Patel*, at [247].
37 *Patel*, at [168].
38 *Patel*, at [170].
39 *Patel*, at [170].
40 *Patel*, at [162].
41 Burrows, *Restatement of the English Law of Contract* (OUP, 2016), 221–222, cited in *Patel*, at [82].
42 *Top Ten Entertainment Pte Ltd v Lucky Red Investments Ltd* [2004] 4 SLR(R) 559 (CA), at [36].
43 *Patel*, at [198].
44 *Patel*, at [95]–[96].

45 *Ken Glass Design Associate Pte Ltd v Wind-Power Construction Pte Ltd* [2003] 1 SLR(R) 34 (HC), at [33(b)] and [35].
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47 *Patel*, at [241]–[243].
48 *United Project Consultants Pte Ltd v Leong Kwok Onn* [2005] 4 SLR(R) 214 (CA), at [56] and [60].
49 *Patel*, at [77].
50 *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1 (UKSC), at [102]; *Patel*, at [132].
51 *Tinsley*, at 375C.
52 *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2011] 1 SLR 657 (HC), at [204]; *Boon Lay Choo v Ting Siew May* [2013] 4 SLR 820 (HC), at [31].
53 *Tinsley*, at 371–372.
54 *Tinsley*, at 376F.
55 *Suntoso Jacob v Kong Miao Ming* [1985–1986] SLR(R) 524 (CA), at [13].
56 *Chee Jok Heng Stephanie v Chang Yue Shoon* [2010] 3 SLR 1131 (HC), at [44].
57 *Chee*, at [45].
58 *Ting*, at [125]–[126].
59 *Patel*, at [87] and [110].
60 *Patel*, at [237].
61 *Patel*, at [134].
62 *Patel*, at [136].
63 *Patel*, at [139]–[140].
64 *Patel*, at [236], [239].
65 *Patel*, at [239].
66 *Patel*, at [239].
67 *Patel*, at [199].
68 *Ting*, at [128].
69 *Holman v Johnson* (1775) 98 ER 1120, at 1121; 1 Cowp 341, at 343.
70 *Patel*, at [113].
71 *Patel*, at [158].
72 *Ting*, at [47].
73 *Ting*, at [26].
74 Illegal Contracts Act 1970 (New Zealand), ss 6–7.
75 *Ting*, at [69].
76 *Patel*, [25] vs. [207] and [259]–[261] .
77 Illegal Contracts Act 1970 (New Zealand), s 7(1).
78 *Patel*, at [266]–[267].
79 Cap 65A (2000 Rev Ed).
80 CDSA, s 5 read with Second Schedule.
81 CDSA, Second Schedule, item 269.
82 CDSA, s 44 read with Second Schedule, item 1.
83 *Patel*, at [108], [184], [198], [254].
84 *Patel*, at [198].
85 *Ting*, at [3].
86 *Patel*, at [3].
87 *Patel*, at [265].